Supreme Court, U.S.
FILED

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IN THE
Supreme Court of the United States

ANITA JOHNSON,

Petitioner,

v.

JOHN E. POTTER,
POSTMASTER GENERAL OF THE UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Whether it is within a district court's discretion to deny an unopposed motion for continuance where a *pro se* plaintiff suffers a real and documented medical emergency on the eve of trial?

2) Whether failure to appear for trial because of a medical emergency is excusable neglect under the three-factor test set forth in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship* for a Rule 60 motion for relief from a judgment where the party has not acted in bad faith or engaged in dilatory practices.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES..... vi

OPINIONS BELOW..... 1

JURISDICTION..... 2

CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIES AT ISSUE..... 3

STATEMENT OF THE CASE..... 4

A. Facts Giving Rise to the Case..... 4

1. Summary..... 4

2. The Underlying Claim for Disability Discrimination..... 5

3. Petitioner Diligently Pursued her Claims in Litigation..... 6

4. Petitioner's Medical Emergency Necessitated a Continuance..... 7

5. Petitioner Sought Relief from the Judgment..... 8

B. The District Court Proceedings.... 8

C. The Appellate Court Proceedings..... 11

REASONS WHY CERTIORARI SHOULD BE GRANTED..... 12

I. Denying an Unopposed Continuance of a Trial to a *Pro Se* Plaintiff who Suffered a Documented Medical Emergency is so Manifestly Unjust as to Undermine Confidence in the Judiciary..... 12

II. The Fifth Circuit's Approach to Medical Continuances is in Sharp Contrast with Other Circuits..... 13

III. The Lack of a Clear Standard for a Medical Continuance is an Issue that has Gone Unresolved for over Fifty Years... 16

IV. Review is Warranted to Ensure Continued Compliance with this Court's Explicit Ruling in *Pioneer Investment Services Co. v. Brunswick Associates L.P.* 17

CONCLUSION 20

APPENDIX A-1

1. Order denying appeal, Fifth Circuit Court of Appeals, dated February 10, 2009 ..... A-2

2. Order denying motion for relief from the judgment, United States District Court for the Northern District of Texas, dated June 19, 2009 ..... A-16

3. Final judgment, United States District Court for the Northern District of Texas, dated April 16, 2009 ..... A-25

4. Order denying motion for continuance, United States District Court for the Northern District of Texas, dated April 16, 2009 ..... A-26

5. Motion for Extension of Time, dated April 15, 2009..... A-28

TABLE OF AUTHORITIES

CASES

Alford v. United States,
709 F.2d 418 (5th Cir. 1983)..... 15

Davis v. Operation Amigo, Inc.,
378 F.2d 101 (10th Cir. 1967)..... 13-14

Gaspar v. Kassm,
493 F.2d 964 (3d Cir. 1974)..... 14-15

Pioneer Investment Services Co. v. Brunswick Associates L.P.,
507 U.S. 380 (1993)..... 17-19

Skinner v. Louisiana,
391 U.S. 963 (1968)..... 16

Skinner v. Louisiana,
393 U.S. 473 (1969)..... 16

Smith-Weik Machinery Corp. v. Murdock Mach. & Engineering Co.,
423 F.2d 842 (5th Cir. 1970)..... 15

Ungar v. Sarafite,
376 U.S. 575 (1964)..... 13

STATUTES

29 U.S.C. § 1254..... 2

RULES

FED. R. CIV. P. 60..... *passim*

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, filed on February 10, 2010, is an unpublished case reported at 2010 WL 454718, 2010 U.S. App. LEXIS 2758, and 22 Am. Disabilities Cas. (BNA) 1874. The opinion is reprinted in the Appendix hereto, pp. A-2 – A-15.

The order of the United States District Court for the Northern District of Texas filed on June 19, 2009, denying a Fed. R. Civ. P. 60 motion for relief from the judgment is reported at 2009 WL 2096211, 299 U.S. Dist. LEXIS 64375. The order is reprinted in the Appendix hereto, pp. A-16 – A-24.

The final judgment of the United States District Court for the Northern District of Texas filed on April 16, 2009 is unreported. The order is reprinted in the Appendix hereto, p. A-25.

The order of the United States District Court for the Northern District of Texas filed on April 16, 2009, denying the *pro se* motion for continuance is unreported. The order is reprinted in the Appendix hereto, pp. A-26 – A-27.

JURISDICTION

On November 21, 2005, Petitioner filed a *pro se* complaint against Respondent in the United States District Court for the Northern District of Texas, alleging violations of the Rehabilitation Act. On April 16, 2009, the court denied a motion for continuance, called the case to trial, and entered a final judgment. A notice of appeal was timely filed on May 15, 2009. On June 19, 2009, the court denied a Rule 60 motion for relief from the judgment. A second notice of appeal was timely filed.

On August 19, 2009, the Fifth Circuit Court of Appeals consolidated the appeals. On February 10, 2009, the appellate court issued an opinion upholding the district court's order.

The jurisdiction of this Court to review the Judgment of the Fifth Circuit is invoked under 29 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIES AT ISSUE

The standard for granting a continuance for a *pro se* party's medical incapacity in a civil case.

This standard is created and maintained by the judiciary itself.

Federal Rule of Civil Procedure 60(b): Relief from Judgment or Order

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

STATEMENT OF THE CASE

A. Facts Giving Rise To This Case

1. Summary

The issue before the Court arises from a district court's denial of an unopposed motion for continuance filed by Petitioner, at that time proceeding as *pro se* plaintiff. The motion for continuance was filed because Petitioner suffered a real and documented medical emergency. Petitioner's motion explicitly asked that the trial be postponed and included a supporting statement from Petitioner's medical doctor, documenting a medical emergency. The district court denied the continuance, called the case to trial, and entered a judgment against Petitioner. Subsequently, Petitioner

obtained counsel and filed a Rule 60(b) motion for relief from the judgment. The motion was denied.

2. The Underlying Claim for Disability Discrimination

The underlying complaint presents a Rehabilitation Act claim of employment discrimination on the basis of disability. Petitioner, a United States postal worker, suffers from Reflex Sympathetic Dystrophy ("RSD"). RSD is a neurological disease that causes the autonomic nervous system to malfunction. Petitioner's nerves misfire, causing pain signals to be sent to the brain. Although Petitioner manages this pain, she sometimes suffers flare-ups in which the pain is overwhelming and debilitating.

Petitioner seeks to succeed in life despite her disability. This is evidenced by her desire to work as well as her efforts to litigate this case. However, Petitioner has nowhere near the functionality of a healthy citizen, and is unable to do ordinary tasks like cooking or driving. Even simple tasks like grooming pose great difficulty.

3. Petitioner Diligently Pursued Her Claims in Litigation

After Petitioner was terminated from her employment, she filed a *pro se* complaint in federal court. From the start, Petitioner aggressively pursued her claims. Petitioner submitted a two hundred page, detailed response to a questionnaire issued by the magistrate judge.

Petitioner's claim is not frivolous. Petitioner survived a motion to dismiss at the onset of the case, as well as a motion for summary judgment following discovery.

Petitioner was finally able to retain counsel, whom she paid $5,000 and promised an additional 40% contingency fee. Petitioner's original counsel negotiated a settlement of $20,000 and promised the Defendant (and the court) that Petitioner would accept. The settlement did not restore Petitioner to her position and left Petitioner with a scant $7,000 after attorney fees. Petitioner refused to accept the settlement. Counsel then sought to withdraw. Petitioner filed a motion for continuance to find replacement counsel.

The motion to withdraw was filed on March 30, 2009 and granted on April 2, 2009. Also on April 2, 2009, the court set trial for April 16, 2009. (Both the Fifth Circuit and the trial court consider this act of

setting a trial date as granting a continuance, the only continuance granted for Petitioner's benefit in this case.)

Although no longer having counsel, Petitioner timely filed pretrial disclosures on April 9, 2009. Petitioner planned to try the case herself.

4. Petitioner's Medical Emergency Necessitated a Continuance

On April 14-15, 2009 Petitioner was in pain throughout the night. The next morning she called her physician who told her to go to the emergency room. Petitioner went to the emergency room where an x-ray was performed. Unfortunately, the x-ray technician grabbed Petitioner's arm, which made the situation even worse.

Upon discharge from the Baylor University Medical Center, Petitioner was given prescriptions for both Lortab and Phenergan. Side effects of these medications include dizziness, drowsiness, constipation, nausea, vomiting, dry mouth, and muscle spasms. Petitioner then proceeded to immediately file a continuance with the court because of her lack of capacity on this occasion.

Although simple and hand written, the motion clearly sets forth that Petitioner has suffered a medical emergency

incapacitating her, asks for a continuance, and attaches a note from her medical doctor verifying Petitioner's medical inability to proceed to trial. The motion was filed with the clerk of the court April 15, 2009.

The Defendant did not oppose the continuance.

The district court denied the unopposed, *pro se* motion for continuance, called the case to trial, and rendered a judgment denying Petitioner any and all relief.

5. Petitioner Sought Relief From the Judgment

Petitioner retained new counsel and filed a Rule 60 motion for relief from the judgment, which was denied.

B. The District Court Proceedings

On November 21, 2005, Petitioner filed a *pro se* complaint against Respondent for disability discrimination in her employment as a postal worker. Petitioner complained that she was adversely treated and terminated because of her Reflex Sympathetic Dystrophy ("RSD"), a nerve disorder that renders her left arm useless and can also cause flare ups of incapacitating pain.

On March 24, 2006, the district court granted Petitioner's motion for leave to proceed *in forma pauperis*.

On November 13, 2006, Respondent filed a motion to dismiss.

On April 16, 2007, Respondent's motion to dismiss was denied.

On May 11, 2007, Respondent filed its answer.

On December 13, 2007, the case was reassigned to the Honorable United States District Court Judge Reed C. O'Connor.

On March 27, 2008, the district court issued an order requiring a scheduling conference and report.

On April 23, 2008, attorney Rebecca L. Fisher filed a notice of appearance of counsel, representing Petitioner.

On April 28, 2008, the district court entered its scheduling order.

On December 3, 2008, Respondent filed its motion for summary judgment.

On January 12, 2008, Ms. Fisher filed a motion to extend deadlines based on Ms. Fisher's medical conditions.

On March 12, 2009, the district court denied Respondent's motion for summary judgment.

On March 13, 2009, Ms. Fisher incorrectly notified the court that a settlement had been reached.

On March 30, 2009, Ms. Fisher filed a motion to withdraw as Petitioner's attorney.

On March 30, 2009, Petitioner herself filed a motion for an extension of time to find an attorney.

On April 2, 2009, the district court granted Ms. Fisher's motion to withdraw and set the case for trial on April 16, 2009, fourteen days later.

On April 9, 2009, Petitioner, now representing herself *pro se*, timely filed pretrial disclosures with the court.

On April 15, 2009, Petitioner filed a letter with the court, explaining that she had a medical emergency. The letter asked for an extension of time. The clerk entered the letter in the court's electronic filing system as a "Motion for Extension of Time."

On April 16, 2009, the district court called the case to trial. Respondent confirmed that they were unopposed to Petitioner's motion for an extension of time. Nevertheless, the district court denied the motion from the bench and called the case to trial. The district court then made findings of fact and conclusions of law that Petitoner failed to appear and entered a final judgment.

On May 15, 2009, the undersigned counsel made an entry of appearance and filed a Rule 60 motion for relief from the judgment.

On June 19, 2009, the district court denied the Rule 60 motion.

C. The Appellate Court Proceedings

On May 15, 2009, Petitioner filed a notice of appeal of the denial of the motion for continuance and the judgment.

On August 10, 2009, Petitioner filed a notice of appeal of the denial of the Rule 60 motion.

On August 19, 2009, the court consolidated the appeals.

On August 26, 2009, Petitioner filed her principle brief.

Ironically, Respondent requested and received a thirty-day continuance resetting the deadline to respond.

On October 27, 2009, Respondent filed his response brief.

On November 13, 2009, Petitioner filed her reply brief.

Despite Petitioner's request, oral argument was not granted.

On February 10, 2010, the appellate court issued its decision.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

Denying an Unopposed Continuance of a Trial to a *Pro Se* Plaintiff who Suffered a Documented Medical Emergency is so Manifestly Unjust as to Undermine Confidence in the Judiciary

The very idea that a *pro se* plaintiff can lose her case merely because she suffers a real and documented medical emergency is offensive, unconscionable, and ridiculous. It is difficult to imagine a situation in which a continuance should more readily be granted.

When a *pro se* plaintiff becomes seriously ill, she cannot act in her role as a litigant, as a witness, or as her own attorney.

A lawsuit should be an intellectual challenge, not a physical one. Justice dictates that lawsuits be decided on merit. Instead of winning or losing on merit, Petitioner lost because she suffered a medical emergency.

II.
The Fifth Circuit's Approach to Medical Continuances is in Sharp Contrast with Other Circuits

The Fifth Circuit's draconian defense of the nearly unfettered discretion of a trial court to deny a continuance is in sharp contrast to other circuits. Nearly every other circuit holds medical continuances to be customary and has adopted safeguards or standards to prevent injustice.

This Court has held that "[A] myopic insistence upon expeditiousness in the face of a justifiable request for delay" is an abuse of discretion. *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 849-50, 11 L.Ed. 921 (1964). This standard, however, is vague and does not provide district or appellate courts with specific guidance.

In the Tenth Circuit, a severe illness that prevents the litigant from appearing in court requires a continuance. *See Davis v. Operation Amigo, Inc.*, 378 F.2d 101, 103 (10th Cir. 1967). "Even when the judge has doubts about the existence of the claimed illness, the movant should be afforded an opportunity to substantiate his claim by proper proof." *Id.*

The Third Circuit has similarly found an abuse of discretion exists where a district court denies a motion for continuance

because of the illness of a party. *Gaspar v. Kassm*, 493 F.2d 964, 969 (3d Cir. 1974).

The Third Circuit ruled that a continuance must be granted for the illness of a necessary party, unless the delay is prejudicial to the opposing party or motivated by procrastination, bad planning, or bad faith:

> [W]e are aware of the annoyance caused to a trial judge when his carefully arranged trial calendar is disarranged, but we cannot let this obscure the fact that we doom the grounds upon which the distinguished district judge acted were insufficient. We do not consider the motion for continuance to be deficient on its face. It is customary to grant a continuance on the ground of illness of a party. We conclude that Kassm's testimony was necessary for the defense of his case, that the granting of a continuance would not have unduly prejudiced the other parties, and that the continuance motion was not motivated by procrastination, bad planning or bad faith on the part of Kassm or his counsel. It

> is the law that where none of the foregoing appear, the denial of a continuance for illness is abuse of discretion.

Id.

Clearly, Petitioner would not have faced the same result had her case arisen in the Third or Tenth Circuits.

The standards of the Third and Tenth Circuits are stark contrast to the Fifth Circuit's position that discretion to deny a continuance is basically unfettered and that a trial court's decision will not be disturbed.[1]

A ruling in this case could offer clarity, guidance, and uniformity.

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[1] The Fifth Circuit has not always held such a staunch position. In *Smith-Weik Machinery Corp. v. Murdock Mach. & Engineering Co.*, the Fifth Circuit characterized a medical continuance as an exception to the general rule of discretion. 423 F.2d 842, 844-45 (5th Cir. 1970). In *Alford v. United States*, the Fifth Circuit set forth factors to be considered. 709 F.2d 418, 424 (5th Cir. 1983). However, as the panel explains in the instant case, subsequent Fifth Circuit cases have set forth nothing more than a broad abuse of discretion standard. App. A-7, n. 1. The panel refused to lower the abuse of discretion standard. Nor does the panel apply or evaluate any of the factors set forth in *Alford*.

III.

The Lack of a Clear Standard for a Medical Continuance is an Issue that has Gone Unresolved for over Fifty Years

This Court previously granted certiorari to resolve nearly the same issue as presented in this case, but where a party was represented by counsel. *See Skinner v. Louisiana*, 391 U.S. 963, 88 S.Ct. 2031, 20 L.Ed.2d 876 (1968). However, the writ was subsequently dismissed. 393 U.S. 473, 89 S.Ct. 704, 21 L.Ed. 684 (1969). In *Skinner*, an attorney with severe diabetes was forced to continue trying the case even after it became apparent that he was suffering exhaustion. Three justices dissented to the dismissal, with Justice Marshall writing a reasoned dissent.

Granting a writ of certiorari in this case would allow the Court to finally address an issue that still divides the circuits over fifty years later.

This disparity is particularly acute as multi-state practices have become more common. Differing standards for routine matters, such as continuances, requires expending significant resources on procedural matters, instead of focusing on the merits of a case.

IV.

Review is Warranted to Ensure Continued Compliance with this Court's Explicit Ruling in *Pioneer Investment Services Co. v. Brunswick Associates L.P.*

In her Rule 60(b) motion, Petitioner asked the trial court for relief from the judgment based on inadvertence and excusable neglect. This Court squarely addressed the standard for review of such a motion in *Pioneer Investment Services Co. v. Brunswick Associates L.P.*, 507 U.S. 380, 395, 113 S.Ct. 1989, 1498, 123 L.Ed.2d 74 (1993). This Court established three factors that must be considered: (1) prejudice to the opposing party, (2) length of delay, and (3) reason for the delay in determining whether Plaintiff's failure to appear was excusable and made in good faith. *Id.*

The district court's analysis is contained on pages 3 and 4 of its order. (App. A-19 – A-23.) Although the order correctly identifies *Pioneer Investment* as the controlling authority, at no point does the district court actually evaluate these three factors. This Court has an interest in ensuring that its decisions are followed.

The district and appellate courts do not address the issue of prejudice to the opposing party. If the court had, it might

have noted that the Respondent was unopposed to the motion.

The district and appellate courts do not address the length of delay. Petitioner indicated that she would be ready for trial as early on June 15, 2009, among other dates. This is only two months after the scheduled trial date, and days after the Rule 60(b) motion was filed.

The district and appellate courts do not address the reason for the delay. On pages 3 and 4 of the district court's order where the district conducts its analysis, the court does not mention Petitioner's RSD, Petitioner's medical condition, or the note and affidavit from Petitioner's medical doctor. The language of pages 3 and 4 of the district court's order intentionally omit any reference to the fact that Petitioner was medically incapacitated. Similarly, the appellate court does not consider Petitioner's medical emergency to factor into an evaluation of the third Pioneer Investment factor.

Simply stated, the appellate court's analysis renders *Pioneer Investment* a nullity.

Instead, the Fifth Circuit finds that "While the court did not provide specific details on the first or second factors, it emphasized the third factor, finding that Johnson had consistently disregarded its

orders and notices and that Johnson's failure to appear at trial was not an isolated incident." (App. A-14.) However, the record shows that the *only* other "incident" was that Petitioner did not attend the trial court's April 2, 2009 hearing in person. The record contains no order for Petitioner to appear at the hearing, nor is there any record of anything in writing being sent to Petitioner to notify her that she should appear in person.[2] Importantly, Petitioner was represented by counsel at the time who did appear at the hearing. There is absolutely no other violation of any order or notice, and Petitioner consistently made thorough filings, timely responses to discovery, and otherwise diligently complied with all rules and directives.

To hold that such a single, insignificant act can justify applying the factors of *Pioneer Investment* deprives litigants in the Fifth Circuit of this Court's jurisprudence.

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[2] The record reflects a statement by the trial judge that he had asked his staff to verbally notify Petitioner of the hearing. The trial judge tried to telephone Petitioner at the hearing but the phone was not answered.

CONCLUSION

Based on the foregoing, Petitioner respectfully submits that this Petition for Writ of Certiorari should be granted. The Court may wish to consider summary reversal of the decision of the Fifth Circuit Court of Appeals.

Dated: May 10, 2010

Respectfully submitted,

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APPENDIX

INDEX TO THE APPENDIX

1. Order denying appeal, Fifth Circuit Court of Appeals, dated February 10, 2009..... A-2

2. Order denying motion for relief from the judgment, United States District Court for the Northern District of Texas, dated June 19, 2009..... A-16

3. Final judgment, United States District Court for the Northern District of Texas, dated April 16, 2009..... A-25

4. Order denying motion for continuance, United States District Court for the Northern District of Texas, dated April 16, 2009..... A-26

5. Motion for Extension of Time, dated April 15, 2009..... A-28

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 09-10528
Summary Calendar

Cons w/09-10782

ANITA JOHNSON,

Plaintiff-Appellant

v.

JOHN E. POTTER, Postmaster General,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:05-CV-2287

Before BENAVIDES, PRADO, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Appellant Anita Johnson sued Appellee John E. Potter, Postmaster General, and the United States Postal Service (the "USPS"), for disability discrimination related to her Reflex Sympathetic Dystrophy ("RSD"), a disorder of the autonomic nervous system. On the morning the trial was scheduled to begin, the district court received Johnson's motion to continue the trial. The district court denied the motion and proceeded with the trial. Later, the district court denied Johnson's motion for relief from judgment under Federal Rule of Civil Procedure 60(b). On appeal, Johnson argues that the district court abused its discretion in denying her motions. Because we find that the district court did not abuse its discretion, we AFFIRM.

I. BACKGROUND

Originally, the district court set this case for trial on March 2, 2009. Johnson's

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* Pursuant to Fifth Circuit Rule 47.5, we have determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Fifth Circuit Rule 47.5.

attorney filed a motion to continue, and the district court continued the trial until March 23, 2009. Johnson made a settlement offer, which the USPS accepted on March 16, 2009. However, Johnson and her attorney apparently had a falling out. Johnson withdrew from the settlement and refused to communicate with her attorney. On March 30, 2009, Johnson filed a motion for extension of time to find new counsel. Johnson's attorney filed a motion to withdraw as counsel.

The district court set a hearing on both motions on April 2, 2009. In its scheduling order, the district court explicitly ordered Johnson to attend the hearing. As per Johnson's prior instructions, the district court contacted Johnson at two separate telephone numbers to inform her of the hearing. However, Johnson did not attend. At the hearing, the district court granted the motion to withdraw and rescheduled the trial date for April 16, 2009.

On April 15, 2009, Johnson filed a document explaining that her RSD had flared up, and requesting time to convalesce and retain new counsel. Attached to the document was a fax from her doctor which stated:

> Anita Johnson currently remains 100 percent totally disabled and will remain In [sic]

> this capacity until further notice. The patient is precluded from even menial/sedentary type tasks secondary to pain sufficient to distract the concentration level, as well as inability to remain In [sic] one position for any substantial length of time.... In summary, this patient is unable to perform any type of duties on a regular basis and therefore is not competent to represent herself in court.

The court did not receive the document until the morning of April 16, 2009. At no time prior to filing the document did Johnson make any effort to contact the court or the USPS to notify them that she would be unable to attend the trial.

After reviewing the note from Johnson's doctor, the district court observed that the note seemed to describe Johnson's chronic underlying condition rather than an acute flare-up, and did not give specific reasons why Johnson was unable to attend the trial on that day. Further, the district court stated that the note did not say when, if ever, Johnson would be available for trial in the future.

The court declined to postpone the trial, explaining that postponement would require either setting an artificial trial date without knowing whether Johnson would be able to attend, or postponing the trial indefinitely until Johnson told the court when she would be able to attend; that the court had already postponed the trial once at Johnson's request; that Johnson had already missed a hearing which the court had specifically ordered her to attend; that the parties had been prepared to settle the case until Johnson backed out at the last minute; that the case was not complex and that Johnson seemed able to represent herself; and that the court had a congested docket, and the case was more than three years old.

The court proceeded with the trial. Because Johnson was not present, the court entered judgment in favor of the USPS and dismissed the case. Johnson filed a Rule 60(b) motion for relief from judgment. The court denied the motion, explaining that Johnson had consistently disregarded the court's orders and that Johnson's failure to attend trial was not an isolated incident. Johnson timely appealed.

II. ANALYSIS

We have jurisdiction under 28 U.S.C. § 1291.

A. Johnson's Motion to Continue the Trial

We review the district court's denial of a motion to continue for abuse of discretion. *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1570 (5th Cir.1989); *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1193 (5th Cir.1986).[1] The district court's discretion is "exceedingly wide." *Fontenot*, 780 F.2d at 1193.

In *Command-Aire Corp. v. Ontario Mechanical Sales and Service Inc.*, Ontario Mechanical Sales ("OMS") sought and

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[1] Johnson cites *Smith-Weik Machinery Corp. v. Murdock Machine and Engineering Co.*, arguing that we should apply a less deferential standard because "[a]n exception ... exists in certain cases when the illness of counsel is the ground for a continuance." 423 F.2d 842, 845 (5th Cir.1970). We have consistently held that *Smith-Weik* explores a facet of the abuse of discretion standard rather than articulating a different standard for cases involving an attorney's illness. See, e.g., *Charles v. Rice*, No. 93-8062, 1993 WL 307892, at * 3 (5th Cir. Aug.6, 1993) (citing *Smith-Weik* in applying the abuse of discretion standard); *Childers v. Pumping Sys., Inc.*, 968 F.2d 565, 572 (5th Cir.1992) (citing *Smith-Weik* for the proposition that motions to continue should be reviewed under an abuse of discretion standard); *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir.1970) (noting that *Smith-Weik* applies an abuse of discretion standard). Accordingly, we apply an abuse of discretion standard in this case.

received three continuances after its president was hospitalized for psychiatric reasons. 963 F.2d 90, 93 (5th Cir.1992). On the day of trial, OMS sought a fourth continuance, submitting a doctor's note that said its president was again unavailable. *Id.* The district court denied the continuance and proceeded to trial. *Id.* We affirmed the district court's ruling. *Id.* at 96. In doing so, we noted that OMS sought a continuance "solely on the basis of a letter from a doctor advising the president of OMS not to leave [his home] until further notice," and that "[t]he letter contained no suggestion of when or if the [president] would be available for trial." *Id.* We stated that "[a] trial court is not required to delay a case indefinitely based on the incapacity of a witness especially where, as here, it is unknown when or if the witness will ever be available to appear." *Id.* Accordingly, we "decline[d] to substitute our judgment about the necessity and propriety of a continuance for that of the district court." *Id.*

In *Johnston*, defendant Harris County Flood District ("HCFD") requested a continuance fifteen days before trial on the ground that Jordan, one of the individual defendants, had suffered a heart attack. 869 F.2d at 1570. The court denied the motion. *Id.* On the first day of trial, HCFD again requested a continuance, presenting the

court with a letter from Jordan's physician saying that postponing the trial for one month would be beneficial to Jordan's health. *Id.* The court denied the motion, in part because the physician did not know when Jordan would be able to testify. *Id.* Although the court began the trial without Jordan, the court held open the evidence until Jordan could testify. *Id.*

In affirming the district court's ruling, we stated that "[t]he grant or denial of a continuance is within the sound discretion of the trial court ... [and we] will reverse the denial of a continuance 'only when the action is, to use the conventional term, an abuse of discretion.' " *Id.* (quoting *Fontenot,* 780 F.2d at 1193) (internal quotation marks omitted). We found that the defendants suffered little or no prejudice because the remaining defendants could assist HCFD's counsel in cross-examination and rebuttal, because continuing would have resulting in a delay of about six months, and because the court made significant efforts to accommodate Jordan by holding open the evidence until he could testify. *Id.* at 1570-71.

In *Smith-Weik,* principal counsel for defendant Murdock became ill with the flu. 423 F.2d at 843 n. 1. Principal counsel notified local counsel, as well as local and principal counsel for Smith-Weik. *Id.* The case was number seventeen on the district

court's non-jury docket for February 10, 1969. Because the case was low on the district court's docket, counsel felt confident it would not be called on February 10. *Id.* However, the district court granted Smith-Weik's untimely demand for jury trial over Murdock's objection, placing the case fourth on the court's jury docket. *Id.* This change had the practical effect of unexpectedly advancing the trial date for the case. *Id.*

Murdock advised the court that principal counsel was sick and that Murdock would need time for his witnesses, who lived outside the area, to travel to the courthouse. *Id.* The court moved on to other matters, and Murdock believed the trial would not start before February 17 at the earliest. *Id.* However, on February 13, Murdock's local counsel was called to the courthouse and told that the trial would begin in four hours. *Id.* Local counsel moved to continue the trial until February 17, explaining that he was not adequately prepared to try the case without principal counsel. *Id.* The court denied the motion, stating that the plaintiffs and their counsel had been in town awaiting trial since February 10. *Id.* Murdock's local counsel moved for a continuance until the next morning so he could fly to Tulsa to confer with principal counsel. *Id.* The court denied the motion, and the case proceeded to trial. *Id.* After the trial, the jury returned a

verdict for Smith-Weik. *Id.* On appeal, we concluded that the district court had abused its discretion, and we reversed. *Id.* at 844-45.

The instant case is analogous to both *Command-Aire Corp.* and *Johnston*. Johnson sought a continuance solely on the basis of a letter from her doctor, and the letter gave no indication when, if ever, Johnson would be available for trial. If the district court had not denied the motion, it might have waited indefinitely for Johnson to be ready for trial. Also like in both *Command-Aire Corp.* and *Johnston*, here the district court had already continued the trial to accommodate Johnson.

In contrast, this case is distinguishable from *Smith-Weik* for several reasons. First, in *Smith-Weik* Murdock asked the district court to continue the trial for a short time-one week-so that principal counsel could recover from the flu, a condition which almost always disappears in a matter of days. In the instant case, the note supplied by Johnson's doctor does not say that she will ever be well enough to attend trial. Further, there is no indication that the district court in *Smith-Weik* had previously continued the trial at Murdock's request. In fact, the district court effectively advanced the trial date when it moved the case from its non-jury docket to its jury docket and assigned the case a high number. In contrast, in the instant case Johnson

already caused the trial to be continued twice, once when her attorney was ill and once when Johnson withdrew from the settlement. Further, the district court never advanced the trial date.

Of course, there is no question that the district court's ruling in this case was much more prejudicial than the district court's ruling in either *Command-Aire Corp.* or *Johnston*. In those cases, attorneys were able to present their cases despite the absence of additional counsel or parties who, while certainly important, were not integral to the litigation's ongoing viability. In stark contrast, here Johnson was proceeding pro se when the district court denied her motion to continue. Thus, the denial was tantamount to a default judgment.

Although the district court's denial was obviously extremely prejudicial to Johnson, we cannot say that the district court acted outside its "exceedingly wide" discretion when it denied Johnson's motion to continue. *Fontenot*, 780 F.2d at 1193. Given the complicated history of this case, we "decline to substitute our judgment about the necessity and propriety of a continuance for that of the district court." *Command-Aire Corp.*, 963 F.2d at 96.

B. Johnson's Rule 60(b) Motion for Relief from Judgment

We review the district court's denial of a Rule 60(b) motion for abuse of discretion. *First Nationwide Bank v. Summer Hous. Joint Venture,* 902 F.2d 1197, 1200-01 (5th Cir.1990). "In reviewing a denial of a Rule 60(b) motion, '[i]t is not enough that the granting of relief might have been permissible, or even warranted, denial must have been so unwarranted as to constitute an abuse of discretion.' " *Id.* at 1201(emphasis in original) (alteration in original) (quoting *Huff v. Int'l Longshoremen's Ass'n, Local # 24,* 799 F.2d 1087, 1091 (5th Cir.1986)) (quotation omitted).

Rule 60(b) states, in pertinent part:

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
(1) mistake, inadvertence, surprise, or excusable neglect;
...
(4) the judgment is void;
...

(6) any other reason that justifies relief.

In the district court, Johnson moved for relief from judgment under Rule 60(b)(1), (4), and (6). On appeal, Johnson focuses only on the "excusable neglect" aspect of Rule 60(b)(1). Accordingly, we address only that aspect.

When determining whether there has been excusable neglect, we review "all relevant circumstances surrounding the party's omission ." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). These circumstances might include (1) "the danger of prejudice to the [non-movant]," (2) "the length of the delay and its potential impact on judicial proceedings," and (3) "the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Id.*

Johnson argues that the district court abused its discretion because it did not sufficiently analyze all three of the factors described in Pioneer Investment. We disagree. While the court did not provide specific details on the first or second factors, it emphasized the third factor, finding that Johnson had consistently disregarded its orders and notices and that Johnson's failure to appear at trial was not an isolated

incident. The district court implicitly determined that to the extent the first and second factors militated in favor of granting the motion (if at all), they were outweighed by the third factor. Certainly, we cannot say that the district court failed to consider "all relevant circumstances surrounding [Johnson's] omission," *id.*, or that the district court's decision was "so unwarranted as to constitute an abuse of discretion." *Huff*, 799 F.2d at 1091(emphasis omitted).

III. CONCLUSION

The district court did not abuse its discretion in denying Johnson's motion to continue the trial or her Rule 60(b) motion for relief from judgment. Thus, we AFFIRM.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ANITA JOHNSON,
Plaintiff,

v. No. 3:05cv2287

JOHN POTTER,
Postmaster General,
United States Postal
Service,
Defendant.

ORDER

Before the Court is Plaintiff's Rule 60 Motion for Relief from Judgment (Doc. No. 81), filed May 15, 2009, Defendant's Response (Doc. No. 85), filed May 26, 2009, and Plaintiff's Reply thereto (Doc. No. 87), filed June 1, 2009. Having reviewed the Motion, the docket and history of this case, and considered the applicable law, the Court finds that Plaintiff's Motion should be and hereby is DENIED.

Additionally, Defendant filed a Motion to Strike Reply Evidence (Doc. No. 89), filed on June 2, 2009, and Plaintiff filed a Motion for Leave to File Supplemental Declaration (Doc. No. 91) on June 3, 2009. The Court did

not consider the materials which are the subject of the respective motions in resolving Plaintiff's Motion for Relief (Doc. No. 81). Thus the Court finds that these motions should be and hereby are DENIED as MOOT.

Plaintiff's Arguments

Plaintiff argues that the Court should set aside its Judgment in this case based on the reasons for relief set forth in Rule 60(b) of the Federal Rules of Civil Procedure. First, Plaintiff argues that she has sufficiently shown inadvertence and excusable neglect . Pl's Mtn. at 3-5; see FED. R. CIV. PRO. 60(b)(1). Second, Plaintiff argues that the Court's judgment in favor of Defendant in this case is void because it is inconsistent with due process of law. Pl's Mtn. at 5- 6; see FED. R. CIV. PRO. 60(b)(4). Finally, Plaintiff argues in the alternative that the catchall provision of Rule 60 provide relief due to exceptional circumstances. Pl's Mtn. at 6; see FED. R. CIV. PRO. 60(b)(6).

Defendant's Response

Defendant first objects to Plaintiff's Motion on jurisdictional grounds, contending that the Court is without jurisdiction to grant the motion because Plaintiff has filed a notice of appeal with the Court of Appeals for the Fifth Circuit. Def. Rsp. at 7-9. Arguing in

the alternative, Defendant then contends that Plaintiff's motion should be denied for failing to establish the requirements of Rule 60(b) for relief from judgment. See generally, Def. Rsp.

Legal Standard

Federal Rules of Civil Procedure Rule 60(b) allows a court to provide relief to a party from a prior ruling or judgment for the several reasons, among which include:

(1) mistake, inadvertence, surprise, or excusable neglect; .. .

(4) the judgment is void; .. .

(6) any other reason that justifies relief.

FED. R. CIV. PRO. 60(b). This rule allows a trial court to reopen a case and to "reconsider such matters so that [the court] can correct obvious errors or injustices. . ." *Fackelman v. Bell*, 564 F.2d 734, 735-736 (5th Cir. 1977). "[W]here the reopening of a judgment could unfairly prejudice the opposing party," courts weigh against granting such motions. *Id.* Additionally, courts should consider whether the "desirability of orderliness and predictability in the judicial process" when entertaining the reopening of judgments. *Id.*

Discussion

The Court first considers Defendant's jurisdictional arguments. In denying Plaintiff's motion, the Court acts within its jurisdiction, albeit limited, because the denial is in furtherance of Plaintiff's appeal before the Fifth Circuit. *Travelers Ins. Co. v. Liljeberg Enters.*, 38 F.3d 1404, 1407 n. 3 (5th Cir. 1994) (quoting *Willie v. Continental Oil Co.*, 746 F.2d 1041, 1046 (5th Cir. 1984), vacated, 760 F.2d 87 (5th Cir. 1985), rev'd on other grounds, 784 F.2d 706 (5th Cir. 1986) (en banc)).

With respect to Plaintiff's first argument, the Court looks to the factors set forth in *Pioneer Investment Services Co. v. Brunswick Associates L.P.*, 507 U.S. 380, 395 (1993), specifically, prejudice to the opposing party, length of the delay, and reason for the delay in determining whether Plaintiff's failure to attend trial was excusable and was made in good faith. The Court's determination on this point "is at bottom an equitable one, taking account of all relevant circumstances surrounding" Plaintiff's conduct in this case. *Pioneer*, 507 U.S. at 395 *see also, Union Pac. R.R. v. Progress Rail Servs.*, 256 F.3d 781, 782 (8th Cir. 2001).

In considering all relevant circumstances in this case, the Court does not "focus narrowly" on Plaintiff's failure to

attend trial, nor does the Court only ask whether her failure was "in some sense excusable." *Union Pac. R.R.*, 256 F.3d at 782.

In so doing, the Court notes a pattern of disregard by Plaintiff for its orders and notices, and does not find that Plaintiff's failure to attend trial was an isolated incident of inadvertence. See *Williams v. New Orleans Public Service, Inc.*, 728 F.2d 730, 734 (5th Cir. 1984).

For example, this Court conducted a hearing on April 2, 2009, to consider the motion of Plaintiff's former attorney to withdraw as counsel (Doc. No. 62), and to take up Plaintiff's Motion for Extension of Time to Find Counsel (Doc. No. 65). Plaintiff failed to attend. As the Court stated that day, Plaintiff failed to attend despite the Court's diligence in providing her notice of the hearing. Despite a heavily weighted calendar, the Court prioritized Plaintiff's case and set Plaintiff's claims for trial beginning on April 16, 2009. Doc. No. 67. Plaintiff was notified of the April 16, 2009, trial setting when she called the Office of the Clerk of the Court to inquire about the hearing conducted that day. See Clerk's Docket Entry dated April 2, 2009.

In the weeks following the hearing on April 2nd and preceeding the trial on April 16th, Plaintiff filed her pretrial materials. Doc. No. 73. However, as Defendant points

out, neither Plaintiff nor her named witnesses appeared in Court at the time appointed for trial. Def. Rsp. at 11. Instead, Plaintiff filed what the Court construed as a Motion for Continuance of Trial on April 15, 2009. Doc. No. 75. As the Court noted, however, Plaintiff's Motion was not received in chambers until the morning of April 16, 2009. Doc. No. 86, pg. 10. Defendant received the Motion at about the same time that morning. *Id.* At no point prior to receipt of the last minute Motion, did Plaintiff attempt to call the Court or Defendant to inform them of her asserted basis for continuance.

With respect to Plaintiff's second argument, the Court notes that its judgment is only void within the meaning of Rule 60(b)(4) if it "lacked subject matter or personal jurisdiction" or if it "acted in a manner inconsistent with due process of law." *Callon Petroleum Co. v. Frontier Ins. Co.*, 351 F.3d 204, 208 (5th Cir. 2003). "If a court has both subject matter and personal jurisdiction, however, the "only inquiry is whether the district court acted in a manner so inconsistent with due process as to render the judgment void.'" *Id.* at 209. (*quoting New York Life Ins. Co. v. Brown*, 84 F.3d 137, 142-43 (5th Cir. 1996)). The Fifth Circuit further explained in *Callon*, "[s]uch circumstances are rare because due process in civil cases usually requires only proper notice and

service of process and a court of competent jurisdiction. *Id.* (citing *New York Life*, 84 F.3d. at 142-143). Moreover, "[p]rocedural irregularities during the course of a civil case, even serious ones, will not subject the judgment to collateral attack." *Id.* (quoting *Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1027 (5th Cir. 1982)).

For the reasons stated by the Court from the bench on April 16, 2009, and as set forth in Defendant's Brief, the Court finds that Plaintiff has had proper notice and service in this case. See Doc. No. 86, pg. 11-17. This case has been active for over three and a half years. Plaintiff has been afforded every opportunity and has been provided access to have her claims attended to by the Court. Her failure to appear for trial is not tantamount to a deprivation of due process. Additionally, the Court repudiates Plaintiff's assertion that "Plaintiff was denied her day in Court because she is disabled." Pl's Mtn. at 6. This Court continued Plaintiff's case on previous occasions and prioritized this action despite one of the highest caseloads on the Northern District, all in order to ensure that Plaintiff have her claims heard. Moreover, the Court notes Defendant's extraordinary and uncommon willingness to ensure Plaintiff's due process rights were protected. See Doc. 85, pg. 20 n. 4.

Plaintiff was fully aware of the trial proceedings set to begin on April 16, 2009. Plaintiff had a fully adequate opportunity to prepare for trial and to have her case heard before the Court. Accordingly, the Court fails to find convincing support for Plaintiff's due process argument, and therefore does not find that its judgment in this matter is void on due process grounds. Plaintiff's last argument relies on the catchall provision of Rule 60. Relief under this provision of the Rule should be granted only where extraordinary circumstances are present. *Am. Guar. & Liab. Ins. Co. v. Hoeffner*, 2009 U.S. Dist. LEXIS 31727, * 4 (S.D. Tex. 2009). For the reasons previously stated, the Court does not find that extraordinary circumstances are present in this case, and, thus relief on this basis should be denied.

Conclusion

Upon consideration of Plaintiff's motion, the Court concludes that relief from its previous Judgment is not warranted. Plaintiff has failed to demonstrate that the asserted bases for relief satisfy the requirement of Rule 60(b) of the Federal Rules of Civil Procedure. Accordingly, Plaintiff's Motion is DENIED.

SO ORDERED this 19th day of June, 2009.

/s/ Reed O'Connor
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ANITA JOHNSON,
Plaintiff,

v. No. 3:05cv2287

JOHN POTTER,
Postmaster General,
United States Postal
Service,
Defendant.

FINAL JUDGMENT

This action came to trial before the Court for consideration. The Court has entered its Findings of Fact and Conclusions of Law finding that Defendant John Potter is not liable to Plaintiff. See Doc. No. 78.

It is therefore ORDERED, ADJUDGED and DECREED that Plaintiff take nothing and final judgment is entered in favor of Defendant.

SO ORDERED on this 16th day of April, 2009.

/s/ Reed O'Connor
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ANITA JOHNSON,
Plaintiff,

v. No. 3:05cv2287

JOHN POTTER,
Postmaster General,
United States Postal
Service,
Defendant.

ORDER

Before the Court is the Motion for Extension of Time (Doc. # 75) filed on April 15, 2009 on behalf of Plaintiff by Somonia M. Williams, who is neither a party to this litigation nor an attorney. Despite these deficiencies, the Court nevertheless liberally construes the Motion as a Motion for Continuance. During open court in the above styled matter, the Court stated its basis for finding that the Motion should be denied. For the reasons stated on the record by the Court on April 16, 2009, the Motion is hereby DENIED.

SO ORDERED on this 16th day of April, 2009.

/s/ Reed O'Connor
UNITED STATES
DISTRICT JUDGE

[Handwritten]

4-15-09 Case No. 3:05 CV-02287

To the Honorable Judge O'Connor

I Anita Johnson have been hurting all night 4-14-09. This morning 4-15-09 I called my Dr. Schade to get in to see him but he instructed me to go to the emergency room

When I arrived, I was put in a room and the Dr. ordered an X ray of my chest. I asked him if there was a Dr. there who was familiar with RSD, he said, no, there is not a RSD doctor there and no one he could call.

While attempting to do the X-ray the technician grabbed my left hurt arm and now I worse than I was when I got there. I told him before not to touch my left side but he did anyway. I am asking the Court to please give me an extension to get better and seek attorney representation.

Respectfully,

/s/ Somonia M. Williams
For Anita L. Johnson

A-29

CENTER FOR PAIN CONTROL
A CARF ACCREDITED FACILITY

Date: 04-15-09

Patient Name: Anita Johnson
SSN: xxxxxxx
Date of Injury: 04-02-00

Anita Johnson currently remains 100 percent totally disabled and will remain in this capacity until further notice. The patient is precluded from even menial/sedentary type tasks secondary to pain sufficient to distract the concentrated level, as well as inability to remain in one position for any substantial length of time. The assessment of her condition is:

1. Disorder of the Autonomic Nervous System: Reflex Sympathetic Dystrophy of the Upper Limb.

Her current medications are: Lortab, Zoloft, Lyrica, Phenergan, Sinequan and Zanaflex.

In summary, this patient is unable to perform any type of duties on a regular basis and therefore is not competent to represent herself in court.

/s/ C.M. Schade

C.M. Schade, M.D., Ph.D.
Board Certified in Pain Medicine
Board Certified in Anesthesiology
Senior Disability Analyst and Diplomat